Supreme Court, U. S.
FILED
JUL 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 80 Original

THE STATE OF COLORADO, PLAINTIFF,

v.

THE STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, DEFENDANTS

ORDER FOR APPEARANCE, MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND STATEMENT OF FACTS AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

J. D. MacFARLANE
Attorney General of Colorado

DAVID W. ROBBINS
Deputy Attorney General of Colorado

1525 Sherman/3d Floor
Denver, Colorado 80203

INDEX

	Page
Order for Appearance	1
Motion for Leave to File Complaint	3
Complaint	5
Statement of Facts and Brief in Support of Motion for Leave to File Complaint	11
Certificate	17

INDEX — Continued

CITATIONS

	Page
Cases:	
Colorado v. *Kansas*, 320 U.S. 383 (1943)	14
Hinderlider v. *La Plata* and *Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)	14
Nebraska v. *Wyoming*, 325 U.S. 589 (1945)	14
Wyoming v. *Colorado*, 259 U.S. 419 (1922)	14
Constitutions, Statutes, and Treaties:	
United States Constitution, Article III, Section 2, Clause 2	5, 8, 11, 14
Colorado State Constitution, Article XVI, Section 5	14
28 U.S.C. § 1251 (a) (1)	5, 11, 14
Colorado Revised Statutes 1973, §§ 37-92-101, et. seq.	6
Colorado Revised Statutes 1973, §§ 37-92-201	6

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ORDER FOR APPEARANCE

The Clerk will please enter our appearance as counsel for the State of Colorado.

J. D. MacFARLANE
Attorney General of Colorado

DAVID W. ROBBINS
Deputy Attorney General
State of Colorado

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MOTION FOR LEAVE TO FILE COMPLAINT

The State of Colorado, appearing by its duly authorized Attorney General, the Honorable J. D. MacFarlane, respectfully moves the Court for leave to file its complaint against the State of New Mexico and the Honorable Toney Anaya, Attorney General of the State of New Mexico, submitted herewith.

J. D. MacFARLANE
Attorney General of Colorado

DAVID W. ROBBINS
Deputy Attorney General
State of Colorado

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COMPLAINT

The State of Colorado, by its Attorney General, brings this suit against the defendant State of New Mexico and its Attorney General, and for its cause of action states:

1. The plaintiff State of Colorado is one of the fifty sovereign states.

2. The defendant State of New Mexico is one of the fifty sovereign states.

3. The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States and 28 U.S.C. Section 1251.

4. The Vermejo River, an interstate stream, rises in a mountainous region of Colorado near its southern border.

The principal tributaries to the Vermejo rising within the State of Colorado are Little Vermejo Creek, Fish Creek, and Ricardo Creek. The watershed of these three streams encompasses approximately twenty-eight square miles of land within the State of Colorado abutting on the northern border of the State of New Mexico. The Vermejo River is tributary to the North Canadian River which is, in turn, tributary to the Arkansas River, all of which are interstate streams. The Vermejo River includes the main stem and its tributaries. There is no Compact or decree of this Court apportioning or adjudicating the water of the Vermejo River between Colorado and New Mexico.

5. Pursuant to the provisions of Colorado Revised Statutes 1973, §§ 37-92-101, *et seq.*, jurisdiction over water matters within the State of Colorado is vested in seven district courts, each having jurisdiction over defined river systems within the state, all as more specifically stated in Colorado Revised Statutes 1973, § 37-92-201.

6. The plaintiff State of Colorado adheres to the doctrine of prior appropriation and water rights are initiated by appropriation and confirmed by court decree issued after notice and hearing.

7. On June 20, 1975, the Colorado District Court for Water Division No. 2, in Case No. W-3961, awarded to C. F. & I. Steel Corporation, a Colorado corporation, a conditional water right for the diversion of a certain portion of the waters of the Colorado tributaries of the Vermejo River. The diversion points decreed are entirely within the State of Colorado for waters rising within the State of Colorado. The decree authorizes the diversion of these waters into the watershed of the Purgatoire River, a tributary of the Arkansas River within the State of Colo-

rado. All legal prerequisites for the awarding of a decree were satisfied by the claimant and the decree is valid under the law of Colorado.

8. On April 26, 1976, entities claiming water rights within the State of New Mexico filed suit in the United States District Court for the District of New Mexico in Case No. CIV-76-244-P to enjoin the use in Colorado of the water right — described in paragraph 7 — until and unless the claimed water rights in New Mexico are fully satisfied. The plaintiffs in the New Mexico District Court case were supported by the State of New Mexico as *amicus curiae*. On motion for summary judgment the District Court entered a permanent injunction granting the relief prayed. That matter is presently on appeal in the United States Court of Appeals for the Tenth Circuit.

9. Pursuant to an exchange of letters dated September 16, 1976 and September 28, 1976, the Governors of the states of Colorado and New Mexico, the Honorable Richard D. Lamm and the Honorable Jerry Apodaca, initiated an attempt to settle the states' differences concerning the waters of the Vermejo River through the vehicle of a negotiated Compact. Commissioners appointed for the purpose met to discuss the possibility of arriving at agreeable terms and conditions for such a Compact. Those meetings occurred on February 8, 1977 and May 18 and 19, 1977. At the close of the meeting on May 19, 1977, the New Mexico Commissioners informed the Colorado Commissioner that they could not recommend an agreement that would allow the State of Colorado to use water from the Vermejo River system and they therefore terminated further negotiations at that time.

10. On January 19, 1978, the Colorado Water Conservation Board resolved and urged the State of Colorado through its Governor and Attorney General to institute

an original action in the Supreme Court of the United States against the State of New Mexico pursuant to Section 2, Article III of the United States Constitution, in order to assert and define the rights of the State of Colorado and its citizens to the use of the waters originating within the State of Colorado in the Vermejo River and its tributaries.

11. Subsequent to the action of the Colorado Water Conservation Board the Governor of the State of Colorado, pursuant to the Constitution of the State of Colorado and applicable statutes and laws, requested the Attorney General of the State of Colorado to institute the instant proceeding.

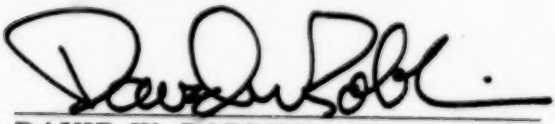
12. The plaintiff State of Colorado has a right and a duty to secure for itself and its citizens a certain equitable share of the waters of all interstate streams rising in and passing through its boundaries and particularly the Vermejo River.

13. The amount of water flowing in the three streams in Colorado tributary to the Vermejo River is significant in terms of the water available in south central Colorado. That region is extremely arid and its economy and the welfare of its citizens depend on the water available for beneficial use. This is particularly true in the drainage of the Purgatoire River where the use of waters pursuant to the decree described in paragraph 7 above is proposed.

14. It is essential to the protection of the State of Colorado and the welfare of its citizens that the equitable share of the State of Colorado in and to the waters of the Vermejo River be determined so that valid water rights in Colorado may utilize such share.

WHEREFORE, the State of Colorado respectfully prays that a decree be entered adjudicating the equitable shares of the parties hereto to the waters of the Vermejo River and its tributaries and declaring that all rights to such waters within the States of Colorado and New Mexico are subject to such equitable shares.

J. D. MacFARLANE
Attorney General of Colorado



DAVID W. ROBBINS
Deputy Attorney General
State of Colorado

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STATEMENT OF FACTS AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

A controversy exists between the plaintiff and the defendants concerning rights in and to the waters of an interstate stream, the Vermejo River and its tributaries rising within the State of Colorado and flowing in a southerly direction into the State of New Mexico.

The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the United States Constitution and under the Judiciary Act, 28 U.S.C. § 1251 (a) (1).

STATEMENT OF FACTS

The Vermejo River, a tributary of the North Canadian River, which is in turn tributary to the Arkansas River, rises high in the Sangre de Cristo mountains near the southern boundary of the State of Colorado. Three tributaries of the Vermejo River have a drainage area within Colorado of approximately 28 square miles and flow in a southerly direction into the State of New Mexico where they become part of the Vermejo River. These tributaries are Ricardo Creek, Fish Creek, and Little Vermejo Creek.

A Colorado District Court has decreed a water right out of the three tributaries of the Vermejo River within the State of Colorado to C. F. & I. Steel Corporation, a Colorado corporation. The water right was granted in Case No. W-3961 in Water Division No. 2 on June 20, 1975, having an appropriation date of May 3, 1960. The right thus decreed permits the diversion of water from the three streams tributary to the Vermejo for use in the drainage of the Purgatoire River, all in the State of Colorado.

The south central region of Colorado, into which the waters so decreed are proposed to be diverted, is extremely arid, and its economy is largely dependent upon and limited by the availability of water for beneficial use. The diversion of water to the Purgatoire River, pursuant to the Colorado decree, is permitted for multiple beneficial uses. In equity, the State of Colorado and its citizens are entitled to the benefit of an equitable share of waters arising in this arid area of Colorado.

Various entities claim the right to use the waters of the Vermejo River within the State of New Mexico for various purposes. In a lawsuit filed in the United States District Court for the District of New Mexico on April 26, 1976, New Mexico appropriators from the Vermejo River,

supported by the State of New Mexico as *amicus curiae*, sought to obtain an injunction precluding the use of the waters of the Vermejo River or its tributaries until and unless all of their claimed water rights were fully satisfied. The injunction, granted on motion for summary judgment, is presently on appeal in the United States Court of Appeals for the Tenth Circuit under Case No. 78-1193. By its terms this injunction subordinates usage of water by the Colorado claimant to all New Mexico claimants.

After this litigation was commenced the State of Colorado attempted to reach agreement with the State of New Mexico upon an equitable apportionment of the waters of the Vermejo River. Pursuant to an exchange of letters dated September 16, 1976 and September 28, 1976, the Governors of the states of Colorado and New Mexico initiated proceedings in an attempt to apportion the waters of the Vermejo River in question through negotiation and Compact. At a Compact negotiating session on May 19, 1977, the commissioners from the State of New Mexico informed the commissioner from the State of Colorado that further negotiations would be inappropriate as New Mexico's view was that the State of Colorado and its citizens had no right to make diversions from the waters of the Vermejo River in Colorado and that New Mexico was entitled to the entire flow of the river to satisfy all of New Mexico's decrees. This litigation seeks to establish the equitable share of the State of Colorado in and to the waters of the Vermejo River and its tributaries so that valid water rights in Colorado may be exercised by its citizens to the fullest extent consonant with Colorado's equitable entitlement to a share of an interstate stream.

POINTS OF LAW

The waters of the Vermejo River arising within the State of Colorado are constitutionally declared in Colorado to be the property of the public and dedicated to the use of the people of the state, subject to appropriation.[1]

This Court in numerous decisions has determined that conflicts as to the rights of different states, on behalf of their respective citizens, to the waters of interstate streams may properly be adjudicated under the Court's original jurisdiction. Article III, Section 2, United States Constitution; 28 U.S.C. § 1251. *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Colorado* v. *Kansas*, 320 U.S. 383 (1943); and *Wyoming* v. *Colorado*, 259 U.S. 419 (1922).

In *Nebraska* v. *Wyoming*, 235 U.S. 589 (1945), the Court thoroughly discussed the matter of disputes between states concerning water in over-appropriated streams and stated that these controversies are appropriate for consideration by the Court and constitute a justiciable controversy under the original jurisdiction of the Court. As the Court stated in the case of *Hinderlider* v. *La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92, at 104 (1938):

> The extent of the existing equitable right of Colorado and of New Mexico in the La Plata River could obviously have been determined by a suit in this Court, as was done in *Kansas v. Colorado*, 206 U.S. 46, 51 L. ed. 956, 27 S.Ct. 655, supra, in respect to rights in the Arkansas River and in *Wyoming* v. *Colorado*, 259 U.S. 419, 66 L. ed. 999, 42 S.Ct. 552, supra, in respect to the Laramie. But resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon

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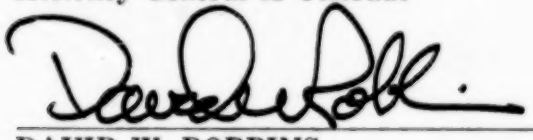
[1] Article XVI, Section 5, Colorado Constitution.

> the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary.

Here the states of Colorado and New Mexico have been unable to agree upon a Compact for the waters of the Vermejo River, thereby leaving the State of Colorado no alternative but to file this action in order that there be preserved to Colorado and its citizens an equitable share in the use and enjoyment in the waters of the Vermejo River. Only this Court can grant such relief.

It is respectfully requested that the motion for leave to file the complaint be granted.

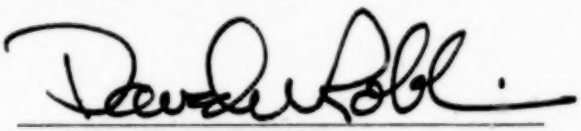
J. D. MacFARLANE
Attorney General of Colorado



DAVID W. ROBBINS
Deputy Attorney General
State of Colorado

PROOF OF SERVICE

I, DAVID W. ROBBINS, Deputy Attorney General, State of Colorado, one of the Attorneys for the Complainant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of July, 1978, I served copies of the foregoing Order for Appearance, Motion for Leave to File Complaint, Complaint and Statement of Facts and Brief in Support of Motion for Leave to File Complaint, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the State of New Mexico.



DAVID W. ROBBINS
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State of Colorado